
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

TED WILLIAM LUPICA
PAULINE LUPICA
(Chapter 7 Case 91-40227)

Debtors

TED WILLIAM LUPICA
PAULINE LUPICA)
and
IPPOLITA'S, INC.

Plaintiffs

v.

WILEY A. WASDEN, III
Chapter 7 Trustee

Defendant

Adversary Proceeding

Number 92-4161

ORDER ON MOTION FOR ENTRY OF DEFAULT

Procedural Background

Plaintiffs, Ted William and Pauline Lupica, filed their Complaint on August 23, 1992, and Defendant filed his Answer and Counterclaim on September 30, 1992. Defendant filed an Amendment to his Counterclaim on March 3, 1993. By Orders dated May 3, 1993 and May 28, 1993, Ippolita's, Inc. was added as an Involuntary Plaintiff. On

June 9, 1993, Defendant filed a Counterclaim against Ippolita's, Inc., and Ippolita's filed its Reply on June 14, 1993. The Lupicas filed their Reply to Defendant's Counterclaim on July 23, 1993.

Defendant filed a Motion For Entry of Default and Request For Hearing On Damages on August 13, 1993 contending that the Lupica's Reply to Defendant's Counterclaim was untimely and unresponsive to the allegations contained therein. Plaintiffs have not filed a response to Defendant's Motion.

Conclusions of Law

Fed. R. Bank. P. 7012(a) provides that a "plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer..." (emphasis added). This language is mandatory, requiring a Plaintiff to file a reply within twenty days of being served with an Answer which contains a Counterclaim.

Ippolita's Reply was filed five days after Defendant filed his Counterclaim. Thus, its Reply was timely filed under Rule 7012(a). In contrast, the Lupica's Reply was filed more than nine months after Defendant filed his Counterclaim and more than four months after Defendant amended his Counterclaim. The Lupica's Reply was therefore not timely filed under Rule 7012(a).

Fed. R. Bank. P. 7055(a) provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

The Lupicas are clearly parties against whom judgment for affirmative relief is sought, and I conclude that their untimely Reply is a failure to plead or otherwise defend as provided under the Bankruptcy Rules. Therefore, pursuant to Rule 7055(a), Defendant is entitled to the entry of Default on his Counterclaim against Plaintiffs Ted William and Pauline Lupica.

O R D E R

IT IS THE ORDER OF THIS COURT that the clerk shall enter default against Plaintiffs Ted William and Pauline Lupica as to Defendant's Counterclaim.

IT IS FURTHER ORDERED that notice issue to all interested parties and that a hearing to determine damages be set for the next available term.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1993.